Supreme Court, U.S.
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No.

03-60

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2002

DR. DIANA LeBRETON - PETITIONER

VS.

PENDLETON MEMORIAL METHODIST HOSPITAL,
PATRICK C. BREAUX, M.D.,
FELIX O. RABITO, M.D., and
THOMAS A. KREFFT, M.D.

ON PETITION FOR WRIT OF CERTIORARI TO

THE LOUISIANA SUPREME COURT

PETITION FOR REHEARING

Dr. Diana LeBreton
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14 pp

QUESTIONS PRESENTED FOR REVIEW

1) Did Petitioner's father have a liberty interest under the Due Process Clause of the Fourteenth Amendment to be reasonably safe and secure from intentional euthanization at a time when he was mentally incompetent? If so, was this liberty interest a "fundamental" right?

2) Did Petitioner's father have a right to privacy under the Due Process Clause of the Fourteenth Amendment which included the right to be reasonably safe and secure from intentional euthanization at a time when he was mentally incompetent? If so, was this right to privacy a fundamental right?

3) If the hospital in which Petitioner's father was intentionally euthanized, and the doctors who euthanized Petitioner's father acted under color of law, did their actions amount to "State Action"?

4) Did the Louisiana Supreme Court deny Petitioner's right to property under the Due Process Clause of the Fourteenth Amendment when it denied Petitioner's application for writ of certiorari and/or review in the manner done?

5) Is "relatives of persons who are sick and mentally incompetent" a classification under the Equal Protection Clause of the Fourteenth Amendment? If so, is it a "suspect class"?

6. Did the actions of the Louisiana Supreme Court, in denying Petitioner's application for writ of certiorari and/or review on the basis of *res judicata* create a classification under the Equal Protection Clause of the Fourteenth Amendment? If so, is this a "suspect class"?

7. Is "sick and mentally incompetent adults whose physicians have falsified death certificates and conspired with hospitals to euthanize them" a classification under the Equal Protection Clause of the Fourteenth Amendment? If so, is this a "suspect class"?

RULE 44.2 CERTIFICATION OF COUNSEL

Pursuant to Rule 44.2, the grounds of this rehearing are limited to intervening circumstances of a controlling and substantial effect and to other grounds not previously presented.

It is presented in good faith and not for delay of the Court.

Dr. Diana LeBreton

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

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JURISDICTION

[x] For cases from state courts:

The date on which the highest state court decided my case was January 31, 2003. A copy of that ruling appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. III, § 1
U.S. Const. amend. 14, § 1
28 U.S.C. § 1257(a)
Supreme Court Rules, Rules 10.1(c), 44
La. Civ. Code art. 3462
La. Rev. Stat. 40:1299.47(A)(2)(a)

STATEMENT OF THE CASE AND REASONS FOR GRANTING THE PETITION FOR REHEARING

When my father, Albert L. LeBreton, Jr., was admitted to Pendleton Memorial Methodist Hospital in New Orleans, Louisiana, on August 13, 1991, the diagnosis was acute myocardial infarction, with brief cessation of pulse and breathing in the ambulance en route to the hospital. He was successfully revived at the hospital and ventilated by endotracheal intubation. He was able to breath on his own after that.

Between his admission on August 13, and his death one week later, my father's condition actually improved, yet his attending physicians made the highly subjective decision to recommend the radical procedure of withdrawing all life-sustaining treatment. Our family, with the exception of myself, was persuaded by the doctors to discontinue food, hydration, antibiotic therapy, and intravenous fluids, effectively starving my father to death.

Despite being diagnosed repeatedly as "semi-comatose," rather than comatose; despite exhibiting only "moderate brain injury" on the Glascow Coma Scale; and despite showing definite neurological improvement on electroencephalographs (EEGs), the doctors nonetheless concluded that my father should be removed from life-sustaining treatment. In their subjective opinions his life would be "less meaningful" if he recovered.

On August 15, 1991, a neurologist not associated with the case advised that, based on an EEG, and the fact that my father was breathing on his own and blinking his eyes

spontaneously, he had improved neurologically and was responding to auditory stimuli. My father had also withdrawn from a pin prick.

Despite these clear indications of his ability to recover over a period of time, that same day Dr. Thomas Krefft wrote on my father's chart that his recovery would not be "meaningful." The next day, Dr. Krefft announced that he disagreed with the other neurologist's findings. On August 17, 1991, Dr. Patrick Breaux stated that in his view the prognosis was "poor" for my father's "meaningful recovery." The next day Dr. Breaux suggested to my mother, Frances, that "any artificial means of support" should be discontinued. My mother, who was completely mentally distraught by that time, reluctantly accepted what happened. We then asked Dr. Felix Rabito, the third physician treating my father, if the I.V. drip could be reconnected. His response was that he would have waited longer, but he supported the action of withdrawal.

At the time it was not explained to her that this meant withdrawal of the feeding tube, all intravenous liquids, all hydration, and all medication (which is what the doctors meant by "artificial means of support"). She thought only the feeding tube would be removed. Early on Sunday morning, without the family around, Dr. Breaux ordered the withdrawal of all food, hydration, intravenous fluids, and medication.

The withdrawal of life-sustaining treatment created significant strife in my family. As a result, Dr. Rabito tried to reconcile the family's differences. However, despite my repeated protests, and my mother's vacillation, Dr. Rabito refused to reinstate life-sustaining treatment. During this time frame, Dr. Breaux grew more forceful, even telling my mother that "we're all dying," in response to her question whether or

not her husband was dying as a result of the doctors' actions. When my mother asked if the "I.V." could be reinserted, Dr. Breaux, to support his actions, lied and said my father's "veins could not take it."

On August 19, despite having been off life-sustaining treatment for over twenty-four hours, my father was "stable from a cardiac standpoint." Another EEG likewise revealed only "moderately severe diffuse encephalopathy." Again, despite his ostensibly improving condition, life-sustaining treatment continued to be withheld. I commented to a nurse, on viewing my father, whose eyes were open, that he looked good. The nurse just laughed. After asking the nurse if she could give my father a sip of water, she replied that she could not, but that I could if I wanted to. I tried to pour water into his mouth but he started to choke, and I had to stop.

Albert L. LeBreton, Jr., died on August 20, 1991, at 4:00 o'clock in the afternoon. He was gasping for breath until the very end, yet the nurses were prohibited from ventilating him because of the orders of Drs. Krefft, Breaux, and Rabito. At the time those orders were given it was unlawful in Louisiana to withdraw food and water regardless of the circumstances.

Dr. Rabito advised that the cause of death was a stroke, but on the Death Certificates given to my family the cause of death had been left blank. Two weeks later three other causes of death were recorded. Six months later Dr. Rabito made a note in the hospital records that my father had been "brain dead" prior to the pronouncement of death at 4:00 p.m. on August 20; however, his EEGs had consistently reflected brain-wave activity and neurological function.

There were no advance directives with respect to my father's treatment or lack thereof; no proxy signed by him; no

"living will"; no durable power of attorney; and no court order. The doctors repeatedly told me and my family that they would "know something in three days." For the record, even given the state of technological medical advancements in 1991, many people have survived and recovered after having been declared "brain dead," or having been deeply comatose.

Even today, as we hear the hue and cry over the decision of Michael Schiavo to remove feeding tubes from his wife, Teri, and the subsequent action by Florida Governor, Jeb Bush, to reverse that decision, this issue assumes public pre-eminence.

In my original suit in Louisiana, I alleged that Drs. Krefft, Breaux and Rabito intentionally euthanized my father by providing my mother, and my siblings incorrect information about my father's medical condition. His death has left my mother and me psychologically traumatized. Worse, however, I fear that other relatives of semi-comatose persons may lose their loved ones as a result of being similarly misinformed by physicians bent on euthanizing those whom they subjectively determine might not have the best quality of life after recovery.

After the suit was filed, it was dismissed without prejudice, pending review by a panel of physicians, and ruling by that panel. My counsel at the time failed to reinstate the suit in a timely manner, and it was dismissed with prejudice.

In a subsequent suit in state district court, based on different claims and legal theories, I had hoped the court would apply the ten-year statute of limitations for personal actions. That suit was dismissed as *res judicata*, on the basis of having already been litigated in the first suit, despite the fact that in order for *res judicata* to apply in Louisiana, the previous suit had to have involved identical parties and claims, and had to have been a "final judgment on the merits."

But, procedurally, in the first suit the trial court denied the defendants' objections; the court of appeal affirmed; and the Louisiana Supreme Court reversed. Therefore, there was never a final judgment on the merits. The trial court's ruling was interlocutory. Moreover, in the second suit I added the hospital as a defendant, and asserted different claims.

My rights, and those of my father, under the Due Process and Equal Protection clauses of the Fourteenth Amendment, have been infringed upon by the actions of Drs. Krefft, Breaux, and Rabito, and by those of Pendleton Memorial Methodist Hospital. Moreover, the state of Louisiana also infringed on those rights by ruling that the prior case was *res judicata* when the decree was interlocutory, and not final in nature.

CONCLUSION

My mother and siblings were talked into removing all life-sustaining treatment from my father, Albert L. LeBreton, Jr., after he had been admitted to a New Orleans hospital for a heart attack. Although empirical medical data clearly indicated that he was only semi-comatose, and had significant brain and neurological function, his physicians convinced my relatives to assent to the removal not only of the feeding tube, but of all intravenous fluids, water, and antibiotics. My father was intentionally given a death sentence by the doctors who were supposed to be treating him.

My father was a graduate of the United States Naval Academy at Annapolis. He took good care of himself, physically, all his adult life. He was a fighter with a strong will to live. It is human nature to survive. My father, like most

people facing death, would have fought hard to live, had he been able to make that decision on his own. Instead, a group of self-serving doctors were able to persuade my distraught family to allow them to make the choice for him.

My father's and my constitutional rights were violated by the actions of those doctors, acting under color of state law, and by the actions of the Louisiana Supreme Court in dismissing my case on the basis of unorthodox interpretation of two seemingly conflicting state laws. I have never had my day in court. I owe it to my father to see that that happens.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dr. Diana LeBreton

Dr. Diana LeBreton, In Proper Person
Date: October 28, 2003